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91-301

No. _____

FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

RITA WHITE,

Petitioner,

vs.

SIMON LEIS, SHERIFF OF
HAMILTON COUNTY, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court itself is required to determine what is protected speech in a public employee First Amendment constructive discharge case and so instruct the jury.

2. Whether Petitioner's subscribing to her sister's letter to the Editor of the *Cincinnati Post* was protected under the First Amendment to the United States Constitution.

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RITA WHITE,

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SIMON LEIS, SHERIFF OF
HAMILTON COUNTY, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Rita White, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on May 21, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The judgment of the United States District Court for the Southern District of Ohio has not been reported. It is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 the petitioner brought this suit in the Southern District of Ohio on February 18, 1988. A bifurcated jury trial occurred on November 20-21, 1989 concerning the issues of liability and a verdict was returned for the Defendant. Judgment was entered on November 27, 1989. On May 21, 1991 the Sixth Circuit Court of Appeals affirmed the District Court's judgment.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Rita White was initially employed by the Hamilton County Sheriff's office as a data entry operator in 1973 (Rita White Vol. I, Tr. 45). In December 1987, Sheriff Simon Leis took office and embarked upon a number of highly publicized policy changes in the Sheriff's office (Rita White Vol. I, Tr. 49). Included in the policy changes were an appearance and dress code, changes in the training for corrections officers and a weight and fitness policy (Rita White Vol. I., Tr. 49-50). The policy changes caused a "great deal of controversy" in the workplace (Rita White Vol. I, Tr. 49); the Sheriff held several press conferences about the policy changes (Rita White Vol. I, Tr. 49) and there was considerable press coverage (Rita White Vol. I, Tr. 49; Janet Lazarus Vol. I, Tr. 29; Simon Leis Vol. I, Tr. 110-111).

Ms. White and her sister Janet Lazarus watched the television news report where it was reported that finger nails were to be regulated in the Sheriff's office to ¼ inch in length. On hearing this Janet Lazarus called Frank Weikel of the Sheriff's public relations office (Rita White Vol. I, Tr. 50-51). She expressed her disagreement with the policies (Janet Lazarus Vol. I, Tr. 30).

Ms. Lazarus was then told by Mr. Weikel to put her views in a letter and he would see to it that the Sheriff would get the letter (Janet Lazarus Vol. I, Tr. 30).

Ms. Lazarus composed the letter to the Sheriff (R-16, Plaintiff's Exhibit 12; Janet Lazarus Vol. I, Tr. 31) and then showed the letter to her sister who agreed with the content of the letter (Janet Lazarus Vol. I, Tr. 35; Rita White Vol. I, Tr. 52). The letter was sent to Mr. Weikel in the first week of September (Rita White Vol. I, Tr. 52). A copy of the letter was sent to the *Cincinnati Post* which published the letter on September 15, 1987 (Janet Lazarus Vol. I, Tr. 35).

The letter in the *Cincinnati Post* stated:

> I am puzzled by Hamilton County Sheriff Si Leis' apparent obsession with appearance and the establishment of a mini Marine Corps. It seems to me that his first priorities should be the safety of the public and his personnel, including both road and corrections officers. Having well trained, competent people is the best way to accomplish this along with the top status and the respect of the public and his peers.
>
> I understand his stated need for discipline and a well groomed appearance, but Mr. Leis has gone overboard with his idealistic Marine image. Shoes, facial hair, women in skirts, and short fingernails do not equate with competence. I do not believe that former Sheriff Lincoln Stokes was represented by slovenly wildmen. Mr. Leis is taking good people and creating a morale problem, which will have an effect on the jobs to be done.
>
> I was reared to regard the police as having compassion and a sense of commitment to the community and the law. If I had need for a deputy, I certainly would not want a Marine stormtrooper to respond.
>
> Right now, the public is laughing at Sheriff Leis. He is

> permitting his ego trip to interfere with the fine job the sheriff's department has been doing.
>
> — (R-16, Plaintiff's Exhibit 2).

On September 11, 1987, Ms. White was called at home on her off day and was told to report to the Sheriff's office on September 14 at 9:00 a.m. (Rita White Vol. I, Tr. 52). Ms. White reported as ordered, and at the outset of the meeting with the Sheriff, she asked if she could tape record the meeting and was told that she could (Rita White Vol. I, Tr. 53).

A transcript of the meeting was admitted into evidence (R-16, Plaintiff's Exhibit 4) containing the following statement of Mr. Leis:

> . . . But I tell you this, young lady, and, um, that if you like to work for this department, I expect your, your support for the department. And if I find that you're, uh, submarining the department by undermining it by, by remarks that you're making, and if you don't support the program, that you can cause letters of this nature to be written, and I'm not sure you did or not, if you are, then I may suggest to you that you submit your resignation and go out and do all the criticizing that you want, But as long as you're working for this department, any person is expected to give loyalty to the employer. The point simply is this, if you don't like it, and you don't like the way it is being run, resign, and then go out and criticize.

Sheriff Leis testified in Court that he summoned Ms. White to meet with him in his office because he put Ms. White "behind" the letter (Sheriff Leis Vol. I, Tr. 114).

Sheriff Leis did not feel he misrepresented his position during the meeting with Ms. White (Sheriff Leis Vol. I, Tr. 113). His position was succinctly stated at trial:

> If you want to criticize me that's your right. But resign and go out and stand on the highest hill in the City and do all the criticism you want. But as long as you work for the department I expect loyalty.
>
> — (Sheriff Leis Vol. I, Tr. 113).

Ms. White then described her reaction to the meeting with Sheriff Leis:

> A. I was very upset. I was crying. I had just been asked five times to submit my resignation because I was allegedly criticizing the department, and the letter hadn't even been in the paper yet, and been told that if anything else had come out that I would be battling down the line, and that's a direct quote from the sheriff. So that when I got out to headquarters I was upset, and then I realized once I got out there, that everything was very quiet, and I would be walking down the hall and passing people, and people were literally turning their heads away, and I couldn't figure out what was going on.
>
> Everybody knew I had gone down to the sheriff's office that was at work that day, so I took my lunch break a little early and went over to my mother's and stayed there for a while. Started — when I get upset, if I'm already having problems with my asthma, it makes it worse. I did have an asthma attack. I went back to work still having a few problems, and at the end of the day I got out of there as fast as I could.
>
> — (Rita White Vol. I, Tr. 58 & 59).

Shortly thereafter Ms. White quit her employment with the Sheriff's office (Rita White Vol. I, Tr. 63 & 64).

Sheriff Leis offered no evidence that the letter sent to his office and the letter published in the *Cincinnati Post* directly or indirectly caused any disruption or interference with the operation of the Sheriff's Department.

At the charging conference Petitioner's counsel urged the Court to charge the jury with the requested written instructions which Petitioner had filed (R-18: Request for Jury Instructions by Plaintiff); specifically, an instruction that the Court had determined that the speech of the Petitioner was protected. The Court declined to give that instruction over counsel's objection, and instructed the jury to determine whether or not Petitioner was commenting on matters of public interest. Additionally, over counsel's objection the Court charged the jury that if they found that ". . . plaintiff sought to interfere with policies adopted by the sheriff or the efficient operation of his office . . .", then they should find for the Defendant.

The jury found for the Defendant.

REASON FOR GRANTING THE WRIT

The Sixth Circuit's decision has broken with precedent and now authorizes the question of what is or is not protected by the First Amendment to be answered by the jury instead of the Court. This is a significant departure from decisions of this Court.

A. Whether Claimed First Amendment Activity Is Protected Is A Question For The Court.

Previously, the question of what was protected activity was a question for the Court and not the jury.

"The inquiry into the protected status of speech is one of law". *Connick* v. *Myers*, 461 U.S. 138, at 148 n.7 (1983). "The ultimate issue — whether the speech is protected — is a question of law . . .". *Rankin* v. *McPherson*, 438 U.S. 378, 386, n.9 (1987).

Petitioner initially moved for partial summary judgment on the First Amendment question (R-4, Motion for Partial Summary Judgment). The motion was denied (R-10).

Prior to trial Petitioner filed written requests for jury instructions (R-18). Petitioner's first request stated as follows:

FINDINGS BY THE COURT

It is the duty of the Court to determine whether the Plaintiff's association with her sister's letter to the editor was speech protected under the First Amendment to the United States Constitution, and whether the conditions imposed by the Defendant with regard to engaging in public comment on matters of public concern were also unconstitutional. The Court finds that Plaintiff's association with her sister's letter was protected under the First Amendment and the reprimand she received therefore was in violation of her rights under that Constitutional provision. The Court also finds that the condition that Mr. Leis imposed

> upon the Plaintiff to refrain from any public criticism was in violation of Plaintiff's rights under the First Amendment to the United States Constitution.
>
> — (R-18, Plaintiff's Request for Jury Instruction No. 1).

During the charging conference Petitioner's counsel insisted that his written instruction be given and that it was required by *Rankin* v. *McPherson*, *supra* (Plaintiff's Counsel Vol. II, Tr. 61). The Court responded that it would charge the jury as follows:

> A public employee has a First Amendment right to comment on matters of public interest, but such an employee does not have a First Amendment right to interfere with the eifficiency of the public service her employer performs. If you find that the plaintiff was commenting on matters of public interest, you should find for the plaintiff on question number one.
>
> If your find that plaintiff sought to interfere with policies adopted by the sheriff or the efficient operation of his office, you should find for the defendant on question number one.
>
> — (Charge by the Court Vol. II, Tr. 98).

Repeatedly, counsel requested the Court to determine the First Amendment question.

> MR. NEWMAN: . . . I believe it's the Court's responsibility under *Rankin* v. *McPherson* to determine the matters that are in that instruction, and I think what I'm saying in my proposed instruction comes right out of footnote in *Rankin* v. *McPherson* that it is the duty of the Court to determine whether the speech was protected.
>
> — (Plaintiff's Counsel Vol. II, Tr. 61).

MR. NEWMAN: May it please the Court, I think it's incumbent upon the Court to determine whether or not the matters commented on were matters of public concern and to so instruct the jury.

— (Plaintiff's Counsel Vol. II, Tr. 63).

MR. NEWMAN: Your Honor, let me state for the record my objection, and I'll simply make reference to it on the record after you instruct the jury. I had requested that you instruct the jury in accordance with the written instructions that I had filed in this court on November 15th and in accord with my view of *Rankin* v. *McPherson*. Your Honor has posed to me the choice now — you have rejected that — the choice of going only with the constructive discharge instruction or instructing with both. And left with this choice, I only can choose that you instruct with both, subject to my objection for the record that I believe that Your Honor should have instructed in accordance with the written instruction that I filed.

THE COURT: All right. That's now a matter of record and you don't have to repeat it in the courtroom. Is there anything else on the jury instructions that you wish to comment on?

— (Charging Conference Vol. II, Tr. 67).

The Court proceeded to instruct the jury as it had proposed to do (Trial Jury Instructions Vol. II, Tr. 98). The instruction was a default of the Court's responsibility.

The responsibility of the Court to determine the First Amendment question is not diminished by reason of the context of a constructive discharge claim. The test for constructive discharge is whether the employer imposed working conditions on the employee where a reasonable person would feel compelled to resign. *Yates* v. *AVCO Corp.*, 819 F.2d 630,

636-37 (6th Cir. 1987). *Henry* v. *Lennox Industries, Inc.*, 768 F.2d 746, 752 (6th Cir. 1985). *Geisler* v. *Folson*, 735 F.2d 991 (6th Cir. 1984).

It is highly relevant for a jury to be advised in such a case that the public employer imposed unconstitutional conditions on the public employee's rights under the First Amendment.

It is surely a different case for a jury to determine whether "under the circumstances a reasonable person would feel compelled to resign" as opposed to "whether a reasonable person would feel compelled to resign in a circumstance where, as the Court instructs, the employer imposed an unconstitutional condition.

B. Petitioner's Subscribing To Her Sister's Letter To The Editor Of The *Cincinnati Post* And To The Sheriff Was Protected Under The First Amendment To The United States Constitution.

1. Petitioner's Speech Related To Matters Of Public Concern.

The Supreme Court in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), devised a test to balance the various interests when determining the scope of a government employee's freedom of expression.

Since *Pickering*, the Supreme Court has refined the balancing test somewhat. In *Connick* v. *Myers*, 461 U.S. 138 (1983), the Court turned the "public concern" element of the *Pickering* formulation into a threshold requirement: "if [a public employee's speech] . . . cannot be faily characterized as constituting speech on a matter of public concern, it is unnecessary for [a court] . . . to scrutinize the reasons for [the employee's] discharge." 461 U.S. at 146 (footnote omitted). According to the Court in *Connick*, only if a court finds that the public employee's speech meets this threshold require-

ment should it go on to balance the employee's interests in free expression against the government's interest in curtailing the expression. *Id.* at 149-50.

In view of this caselaw, Ms. White's speech was protected. The Sheriff invited public discussion and sought public support for his new dress, physical fitness, and law enforcement policies. The issues were thrust into the public forum by the Sheriff; Ms. White and her sister only sought to participate in that discussion. The substance of this discussion was a matter of public concern under *Pickering* and *Connick*.

2. Under The Pickering Balancing Test, The Interests Favoring Petitioner's Speech Are Substantial.

In *Pickering*, *supra*, the Court recognized that the State, as an employer, may have a greater interest in regulating the speech of its employees than in regulating the speech of other citizens in order to perform its public services effectively. *Pickering*, 391 U.S. 563, 568.

The Court stated that [t]he problem in any [government employee free speech] case is to arrive at a balance between the interest of the . . . [employee], as a citizen in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* On the other hand, the Court also recognized that public employees are in an extraordinary position to observe and comment on how their governmental departments function. *Id.* at 572.

The balancing process from *Pickering* requires the Court not only to determine the existence and extent of the harm to the governmental interest caused by the employee's speech, but also to weigh that injury against the employee's *and* the public's interest in the speech. *Id.* at 568.

The Court in *Pickering* noted: "While criminal sanctions and damage awards have a somewhat different impact on the

exercise of the right to freedom of speech from dismissal from employment, *it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.*" *Id.* at 574 (emphasis added). *See also Yoggerst* v. *Stewart*, 623 F.2d 35, 39 (7th Cir. 1980) (reprimand carries threat of discharge).

Only by being free from the threat of dismissal or sanction will a public employee be willing to inform the public and public agencies of deficiencies in governmental departments which provide important public services. In order to determine when a State's interests are sufficient to restrict its employee's speech, the Court in *Pickering* adopted an *ad hoc* balancing test whereby the employee's interest to comment on matters of public concern is weighed against the State's interest in promoting the efficiency of public service. 391 U.S. at 568.

The *Pickering* Court listed several factors which support an employee's interest in free expression and militate against the government's interest in the restriction of speech: whether the statement involves a matter of legitimate public concern; whether the speech was made in a public context; and the likelihood that the employee would have an informed opinion on the subject. *Id.* at 569-73.

Ms. White's expression here fits well within the factors listed above. First, whether Sheriff Office policies are affecting the performance of deputies' duties is clearly in the public concern. *See McMurphy* v. *City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986) ("Obviously, the public is concerned with how a police department is operated, . . ."). Second, while the speech at issue was made in a public context, its author was not a Sheriff Deputy. Thus, its dissemination would not be attributed to a Sheriff's Office employee and whatever "harm" may have flowed from it was therefore very limited. Third, petitioner, as a Sheriff Deputy, has an informed opinion of the impact of Sheriff's Office policies on the perform-

ance of deputies' duties. *See O'Brien* v. *Town of Caledonia*, 748 F.2d 403, 406-407 (7th Cir. 1984) ("a policeman's rights must be vigilantly protected because he or she is 'extraordinarily able to inform the public of deficiencies in this important governmental department.' ").

In the instant case, Petitioner's duties were clerical; she had no policy-making role; she was not in daily contact with Sheriff Leis; did not deal with confidential Sheriff's Office information; had very little contact with the public; and did not represent the Sheriff's Office in its relations with the press (Rita White Vol. I, Tr. 45; R-4, Affidavit of Rita White in Support of Plaintiff's Motion for Summary Judgment). *Pickering* teaches that Petitioner's criticisms of Defendant's policies are therefore entitled to greater protection. 391 U.S. at 570 n. 3.

3. Since Sheriff Leis Did Not Articulate Any Recognized State Interest To Justify The Suppression Of Petitioner's Speech, Under Pickering And Consistent With The First Amendment, Petitioner Could Not Be Punished.

Among the State interests identified by the *Pickering* Court were the promotion of efficiency in government operations, *see id.* at 568; and the ability of the government to rebut false statements made by its employees without undue difficulty. *Id.* at 572. Restriction of a public employee's speech will be allowed if there has been a showing that the speech in question injured a substantial public interest or rendered the employee incompetent to perform his or her job.

Here, Petitioner's speech did not give rise to any obstruction of efficiency in government operations; nor did Defendant prove Petitioner's speech made her incompetent to perform her duties as a deputy.

In *Pickering*, the school board had to prove that Pickering's letter disrupted school operations. 391 U.S. at 570. In *Rankin* v. *McPherson*, *supra*, the Court made government production of evidence of harm of a recognized State interest determinative if the government was to "demonstrate a state interest that outweighs [petitioner's] First Amendment rights."

Simply because Ms. White's speech was critical of the Sheriff does not strip it of its First Amendment protection. The court in *Rankin* quoted *Bond* v. *Floyd*, 385 U.S. 116, 136 (1966), to support this proposition: " 'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.' " *Rankin*, 107 S.Ct. at 2898.

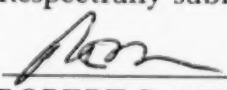
In the case at bar, Sheriff Leis did not offer any proof of negative impact on the State interest which the Court identified above.

Since the Sheriff did not articulate any recognized State interest to justify the suppression of Appellant's speech, it was protected under the First Amendment.

CONCLUSION

The Sixth Circuit's decision is a very substantial diversion from this Court's First Amendment precedents. The Sixth Circuit has now conferred upon juries the responsibility of deciding what is protected under the First Amendment. Formally, this was the Court's duty. First Amendment claimants now risk jury disapproval of ideas that are not popular and ideas that may offend. First Amendment protection now depends on a unanimous jury vote.

Respectfully submitted,



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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be *prominently* displayed if this decision is reproduced.

NO. 89-4102

UNITED STTES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RITA WHITE,
Plaintiff-Appellant,

v.

SIMON LEIS, SHERIFF OF HAMILTON COUNTY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Decided and Filed May 21, 1991

BEFORE: MARTIN, KRUPANSKY, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM: The appellant, Rita White, appealed from a jury verdict finding in favor of appellee, Hamilton County Sheriff Simon Leis. White had filed a complaint alleging that her first amendment rights had been violated by the punitive actions taken by her employer, Leis.

Sheriff Leis entered upon his duties as sheriff of Hamilton County in December 1987 and instituted a number of policy changes in the operation of the sheriff's office, including an appearance and dress code. These changes received considerable press coverage. Following a television news report in which it was reported that fingernails were to be regulated to ¼ inch in length, Rita White's sister, Janet Lazarus, called the sheriff's office to complain. She was directed to submit her views in a letter to the sheriff's office. Janet Lazarus composed the letter and mailed a copy to the sheriff's office and the *Cincinnti Post*, which published it.

After he received the letter, Leis summoned Rita White into his office and suggested that she should resign if she was dissatisfied with the manner in which the office was operated. White advised that she had not written the letter and had not discussed its substance with her sister before it was written. Shortly after this meeting, White entered upon a requested and approved leave of absence. She then resigned from her employment at the sheriff's office.

White charged that the district court erroneously ignored her first amendment freedom of expression interests implicated by her sister's letter; that the court incorrectly charged the jury; that the trial court incorrectly excluded evidence bearing upon constructive discharge; and that the trial court was biased against White. Assuming, without deciding, that White had a first amendment interest that was implicated by her sister's letter, her appeal must fail because she was not actually or constructively discharged by the sheriff's office.

Although constructive discharge is partially a question of law, the district court's rulings on relevancy and the materiality of factual evidence bearing upon the issue may not be disturbed on appeal in the absence of a showing of a clear abuse of discretion. *Geisler* v. *Folsom*, 735 F.2d 991, 997 (6th Cir. 1984). In determining whether an employee had been constructively discharged, the court's consideration was limited to the objective feelings of the employee and the in-

tent of the employer. *Yates* v. *Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987). The trial court excluded testimony regarding the subjective understandings of White and Leis. Since that testimony was not relevant to the issue of constructive discharge, the trial court's rulings were not clearly an abuse of discretion.

The trial court correctly instructed the jury on the law of constructive discharge and requested it to return a special verdict form that posed the following interrogatory. Do you unanimously find that Plaintiff was discharged from her job either constructively or otherwise?" The jury responded "No" and returned a verdict for the defendant. This special verdict, which was supported by the evidence in the record, is dispositive of any first amendment claim White may have had. Thus, the judgment entered by the district court in favor of the appellee Sheriff Simon Leis is AFFIRMED.

ISSUED AS MANDATE: June 12, 1991
COSTS: None

[DULY CERTIFIED]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

CASE NUMBER: C-1-88-167

RITA WHITE,
v.
SIMON LEIS.

JUDGMENT IN A CIVIL CASE
(Filed November 27, 1989)

☒ **Jury Verdict.** This action came before the Court before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision had been rendered.

IT IS ORDERED AND ADJUDGED

. . . that based upon the responses of the jury to questions submitted to it, the Court directs that judgment be entered for the defendant at the cost of the plaintiff

Date: November 27, 1989

KENNETH J. MURPHY
Clerk

/s/ S. M. SNYDER
(By) Deputy Clerk